Supreme Court, U.S.
FILED
982061 JUN 24 1999

No.

IN THE

Supreme Court of the United States

PETER PI and COR-BON
CUSTOM BULLET COMPANY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Where an indictment has been dismissed because the defendant did not commit the offense charged, does the doctrine of *res judicata* bar re-indictment of the defendant upon the same facts but a different charge?

STATEMENT PURSUANT TO RULE 29.6

Petitioner, Cor-Bon Custom Bullet Company, has no parent companies and there are no publicly held companies that own 10% or more of its stock.

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Appendix B — Order Of The United States District Court For The Eastern Division Of Michigan, Southern Division Dated And Filed January 7, 1998 ..... 12a

Petitioners, Peter R. Pi and Cor-Bon Custom Bullet Company, Inc., respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at *United States v. Pi*, __ F.3d __, 1999 WL 198418 (6th Cir. 1999) (App. A). The order of the District Court in *United States v. Pi*, Crim. No. 97-CR-80681 (E.D. Mich. Jan. 7, 1998) (App. B) is unpublished.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on April 12, 1999. The jurisdiction of this Court is involved under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case turns upon the correct application of the common law doctrine of *res judicata*. There are no constitutional or statutory provisions directly involved in this case.

STATEMENT OF THE CASE

On or about June 26, 1997, Peter R. Pi and his company, Cor-Bon Custom Bullet Company, were indicted for willfully failing to collect, account for and pay the tax on

shells and cartridges, in violation of 26 U.S.C. § 7202. But Mr. Peter Pi and his company did not have a duty to collect, account for and pay the tax in question, so they moved to dismiss the indictment. The United States consented to dismissal of the indictment. The District Court dismissed the indictment.

Then the United States had Mr. Pi and his company again indicted. The second indictment charged Mr. Pi and his company with willfully attempting to evade or defeat the tax on shells and cartridges or the payment thereof, in violation of 26 U.S.C. § 7201 (the Government characterizes the second indictment as the "first superseding indictment," but this is incorrect, as the first indictment was dismissed). The same facts underlie both indictments; only the legal theories are different.

Mr. Pi and his company moved to dismiss the second indictment as *res judicata*. The District Court denied that motion, and the defendants appealed. The Sixth Circuit's opinion affirming the District Court limits the common law doctrine of *res judicata* and rejects this Court's opinion in *United States v. Oppenheimer*, 242 U.S. 85 (1916). Accordingly, Mr. Pi and his company petition this Court for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE SIXTH CIRCUIT'S OPINION BELOW ABJURES THE SUPREME COURT'S HOLDING IN *OPPENHEIMER* AND LIMITS THE COMMON LAW DOCTRINE OF *RES JUDICATA*.

In *United States v. Oppenheimer*, 242 U.S. 85 (1916), a grand jury indicted Oppenheimer for conspiracy to commit bankruptcy fraud. Oppenheimer moved to quash the indictment on the ground that the one-year statute of limitations of § 29d of the Bankruptcy Act of 1898, Act of July 1, 1898, c. 541, § 29d, 30 Stat. 544, 554, had expired on the offense. The Government apparently consented to the motion to quash. The District Court granted the motion.

Then this Court issued its opinion in *United States v. Rabinowich*, 238 U.S. 78 (1914), which held that the one-year statute of limitations of § 29d of the Bankruptcy Act of 1898 did not apply to the offense of conspiracy to commit bankruptcy fraud. Then the Government had Oppenheimer indicted again on the same facts, and Oppenheimer moved to quash the second indictment. Oppenheimer argued that the dismissal of the first indictment was *res judicata* as to the second. This Court agreed with Oppenheimer. Writing for a unanimous Court, Justice Holmes said:

> It cannot be that a judgment of acquittal on the ground of the statute of limitations is less a protection against a second trial than a judgment upon the ground of innocence, or that such a

> judgment is any more effective when entered after a verdict than if entered by the Government's consent before a jury is empaneled.

242 U.S. at 87. Indeed, the present case is a better one than *Oppenheimer* for application the doctrine of *res judicata*. In the present case, the first indictment was dismissed not because the statute of limitations had expired upon the offense charged, but because the defendants *did not commit* the offense charged.

Res judicata precludes not only matters that were adjudicated in the earlier proceeding, but also matters that might properly have been presented in that proceeding. In *Lipscomb v. United States*, 226 F.2d 812 (8th Cir. 1955), *cert. denied*, 350 U.S. 971, *reh'g denied*, 350 U.S. 1003 (1956), a prisoner moved under 28 U.S.C. § 2255 to vacate his conviction. The Eighth Circuit noted that the movant had filed an earlier motion seeking the same relief albeit upon different contentions, and that the District Court had denied the earlier motion. In holding that the denial of the first motion was *res judicata* as to the second, the Eighth Circuit said:

> The same relief was sought in [the earlier] motion as in the motion here under consideration and the contentions now presented could have been urged in that proceeding as there is no claim that they arose subsequent thereto and the decision in that proceeding is binding on the defendant not only as to the contentions there made but as to all other contentions which could have been made.

In the course of our opinion in *Mitchell v. Village Creek Drainage Dist.*, 8 Cir., 158 F.2d 475, 477, it is said:

> It is elementary that *res judicata* may be pleaded as a bar not only as respects matters actually presented to sustain or defeat the right asserted in the earlier proceeding but also as to any other available matter which might have been presented to that end. [Citations omitted].

226 F.2d at 816-17. *See also Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 378 (1940); *Anselmo v. Hardin*, 253 F.2d 165, 168 (3d Cir. 1958). Put another way, a final judgment on the merits in one action is *res judicata* as to another action between the same parties or their privies if the two actions arise out of the same nucleus of operative fact. *E.g., Lane v. Peterson*, 899 F.2d 737, 742 (8th Cir.), *cert. denied*, 498 U.S. 823 (1990); *Woods v. Dunlop Tire Corp.*, 972 F.2d 36, 38-39 (2d Cir. 1992). *See also Yawn v. United States*, 244 F.2d 235, 237 (5th Cir. 1957) (quoting *Serio v. United States*, 203 F.2d 576, 578 (5th Cir.), *cert. denied*, 346 U.S. 887 (1953) ("[T]he same facts can not be twice litigated by the same sovereign against the same defendant")).

In *The Queen v. Miles*, 24 Q.B.D. 423 (1890), cited by Justice Holmes in *Oppenheimer*, Miles was charged with *unlawfully assaulting and beating* Charles Living. The case against Miles was discharged under the Summary Jurisdiction Act, 1879, 42 & 43 Vict. c. 49, s. 16, which provides in part:

> If upon the hearing of a charge for an offense punishable upon summary conviction, the Court of Summary Jurisdiction think that, though the charge is proved, the offense was in the particular case of so trifling a nature that it is inexpedient to inflict any punishment, or any other than a noncriminal punishment[,] . . . [t]he Court, without proceeding to conviction, may discharge the information.

Later, Miles was indicted on a five-count indictment arising out of the same incident with Living. Count one charged Miles with *unlawfully and maliciously wounding* Living. Count two charged Miles with *inflicting great bodily harm* upon Living. Count three charged Miles with *assaulting* Living, and *beating, wounding, and ill-treating* him, *thereby occasioning* to him *great bodily harm*. Count four charged Miles with *beating, wounding and ill-treating* Living. The fifth count had been dismissed. The Queen's Bench Division was of the unanimous opinion that the later indictment had to be quashed because of the earlier adjudication upon the same facts.

Similarly, in the case before the Court, the same facts underlie both indictments. Only the legal theories are different. As the adjudiciation in the earlier case was *res judicata* as to the later case in *Miles*, the dismissal of the first indictment is *res judicata* as to the second indictment in the case before the Court.

The Court of Appeals in this case limited the doctrine of *res judicata* in criminal cases to the bounds of the Fifth Amendment protection against double jeopardy: "The doctrine of *res judicata* bars subsequent litigation between

parties on matters that have previously been fully and finally adjudicated because of the double jeopardy clause guarantee against being twice put to trial for the same offense." Slip Op. at 6-7. If this position is the law, then dismissal of an indictment pretrial can never have *res judicata* effect. The Supreme Court expressly rejected this position in *Oppenheimer*:

> The safeguard provided by the Constitution against the gravest abuses has tended to give the impression that when it did not apply in terms, there was no other principle that could. But the Fifth Amendment was not intended to do away with what in the civil law is a fundamental principle of justice (*Jeter v. Hewitt*, 22 How. 352, 364), in order, when a man once has been acquitted on the merits, to enable the Government to prosecute him a second time.

242 U.S. at 88. Similarly, in *Yawn v. United States*, 244 F.2d 235, 237 (5th Cir. 1957), the Fifth Circuit said that "[w]hile *res judicata* is related to double jeopardy and in certain cases my have an identical effect, [citations omitted], it may have determining effect in situations where double jeopardy is unquestionably inapplicable."

Because the Court of Appeals in this case elected not to follow the Supreme Court's holding in *Oppenheimer*, thereby limiting the common law doctrine of *res judicata*, this Court should grant the Petition.

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS' OPINION IS NOT WELL-FOUNDED IN LAW.

The Court of Appeals relied upon three cases and a court rule in holding that the dismissal of the first indictment was not *res judicata* to the second. The opinion in *United States v. Senak*, 477 F.2d 304 (7th Cir.), *cert. denied*, 414 U.S. 856 (1973), does not disclose the factual allegations of the two indictments. Moreover, the only ground relied upon by the defendant in moving to dismiss the second indictment was double jeopardy; *res judicata* is not mentioned in the opinion.

United States v. Root, 366 F.2d 377 (9th Cir. 1966), *cert. denied*, 386 U.S. 912 (1967), was a prosecution for the kidnapping of Frank Sinatra, Jr. Count One of the indictment charged conspiracy. Count Two charged interstate transportation of the kidnap victim. Counts Three through Five charged separate transmissions in interstate commerce of ransom communications, and aiding and abetting. Count Six charged possession of the ransom money. The District Court correctly held that dismissal of Count One was not *res judicata* as to the remaining counts. Obviously, the conspiracy count in *Root* involved facts (an agreement and an overt act in furtherance thereof) different from those of the target offenses, and therefore that the dismissal of Count One could not have *res judicata* effect as to Counts Two through Six. It is well-settled that where counts of the same indictment charge offenses involving different facts, an acquittal on one count is not *res judicata* as to the others. *E.g., Dunn v. United States*, 284 U.S. 390,

393 (1932) (Holmes, J.). *See also United States v. Woodell*, 285 F.2d 316, 317 (4th Cir. 1960); *United States v. Perrone*, 161 F. Supp. 252, 260-61 (S.D.N.Y. 1958). These cases have absolutely no relevance to the present case because District Court below dismissed all of the counts of the first indictment. Moreover, all eighteen counts of the first indictment below involve exactly the same facts.

In *Robinson v. United States*, 284 F.2d 775 (5th Cir. 1960), the United States indicted Robinson for illegal possession and concealment of non-tax-paid whiskey. The indictment resulted from information reported to the United States Attorney's office in Jacksonville by a local police officer, Anderson. Anderson had seized the whiskey on a search warrant, arrested Robinson, and initiated a criminal proceeding against Robinson in the Florida courts. The United States District Court of the Southern District of Florida stayed its hand and dismissed the indictment on "grounds of public policy." The District Court found that "it would be unseemly for both the state and federal governments to move forward at the same time against the same man for what amounted to the same crime." 284 F.2d at 775.

Some time later the United States Attorney learned that he and the Federal District Court had been misinformed as to the facts on which its dismissal was based. The true facts were called to the attention of the Federal District Court, and Robinson was re-indicted. In affirming Robinson's conviction, the former Fifth Circuit said:

> We note that the motion to dismiss the first indictment did not attack the indictment with respect to its sufficiency or with respect to any

> point that might exculpate the defendant. The objection was based on principles of comity. The court's application of the principles was based on misinformation. *See United Sates v. Janitz*, 3 Cir., 1947, 161 F.2d 19 and *Untied States v. Gaskin*, 1944, 320 U.S. 527, 64 S. Ct. 318, 88 L. Ed. 287.

284 F.2d at 776. In the case presently before the Court, in contrast, there are no principles of comity at issue. Nor was the District Court below misinformed in dismissing the first indictment. Rather, the District Court dismissed the first indictment in this case *because the defendants did not commit the crimes charged.*

Finally, the Court of Appeals said that "Fed. R. Crim. P. 12(h) provides that an indictment dismissed because of a defect may be superseded by a new indictment." Slip. Op. at 7. Fed. R. Crim. P. 12(h) provides in pertinent part:

> If the court grants a motion *based on a defect in the institution of the prosecution or in the indictment* or information, it may also order that the defendant be continued in custody or that bail be continued for a specified time pending the filing of a new indictment or information.

(Emphasis added). The Supreme Court recognized this principle in *Oppenheimer*: "Of course the quashing of a bad indictment is no bar to a prosecution upon a good one. . . ." 242 U.S. at 87. But in the same sentence the Court said that "a judgment for the defendant upon the ground that the prosection is barred [by the statute of limitations] goes to his liability as a mater of substantive law and one judgment

that he is free as matter of substantive law is as good as another." *Id.* An indictment might be defective, for example, if it omits an element of the offense charged. *E.g.*, *Lee v. United States*, 432 U.S. 23 (1977). But the first indictment below was fair on its face. It set forth 26 U.S.C. § 7202 verbatim eighteen times. In dismissing the first indictment, the District Court freed defendants therefrom as a matter of substantive law. Clearly, the dismissal of the first indictment in this case is *res judicata* as to the second. Because the Court of Appeals' opinion is not well-founded in law, this Court should grant the Petition.

III.

THE PETITION SHOULD BE GRANTED BECAUSE THE HOLDING OF THE COURT OF APPEALS DOES NOT REFLECT SOUND PUBLIC POLICY.

Peter Pi's family suffered the uncertainty of an indictment which threatened the liberty of their husband, father and breadwinner. Peter Pi lived with the uncertainty of not knowing what would happen to his business in the event he lost his liberty. Then the indictment was dismissed as a matter of substantive law.

The Government is the master of its indictment. It could have indicted Peter Pi under 26 U.S.C. §§ 7201 and 7202 or under § 7201 alone. It chose to indict under § 7202 alone. That indictment was dismissed as a matter of substantive law. The Government should live with the consequences of its election.

Now Peter Pi and his family are again under the cloud of a prosecution. The Government has re-indicted Peter Pi on the same facts but a different charge.

Res judicata is "a rule of fundamental justice and substantial justice, 'of public policy and private peace,' which should be cordially regarded and enforced by the courts." *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981). *See also Wilson v. United States*, 166 F.2d 527, 529 (8th Cir. 1948).

Because the failure of the Court of Appeals to give effect to the doctrine of *res judicata* is unsound in public policy, this Court should grant the Petition.

CONCLUSION

The doctrine of *res judicata* requires parties to litigate all of their claims against each other in one proceeding. This important doctrine serves the interests of judicial economy and private peace. The Court of Appeals' opinion abjures this Court's opinion in *United States v. Oppenheimer*, 242 U.S. 85 (1916), and limits the common law doctrine of *res judicata*. Accordingly, Mr. Pi and his company respectfully request that this Court grant their Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DATED AND FILED APRIL 12, 1999

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

PETER PI; COR-BON CUSTOM BULLET COMPANY,
Defendants-Appellants.

No. 98-1119

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
Nos. 97-80681-1; 97-80681-2—Robert E. DeMascio,
District Judge.

Argued: March 15, 1999

Decided and Filed: April 12, 1999

Before: JONES, CONTIE, and MOORE, Circuit Judges.

COUNSEL

ARGUED: Stephen J. Dunn, Troy, Michigan, for Appellants. Krishna S. Dighe, OFFICE OF THE U.S. ATTORNEY, Detroit, Michigan, for Appellee. **ON BRIEF:**

Appendix A

Stephen J. Dunn, Troy, Michigan, for Appellants. Krishna S. Dighe, OFFICE OF THE U.S. ATTORNEY, Detroit, Michigan, for Appellee.

OPINION

CONTIE, Circuit Judge. Defendants-appellants, Peter Pi and Cor-Bon Custom Bullet Company, appeal the district court's refusal to dismiss the indictment in this case. For the following reasons, we affirm the district court.

I.

Since 1990, defendant Peter Pi, through his company and co-defendant Cor-Bon Custom Bullet Company ("Cor-Bon"), has been in the business of manufacturing ammunition for firearms. In 1995, an employee of Cor-Bon brought to the attention of the Bureau of Alcohol, Tobacco and Firearms ("ATF") the fact that Cor-Bon, under the direction of Mr. Pi, had been significantly under-reporting its sales of ammunition in order to reduce its excise tax liability. Subsequently, the ATF investigated and examined Cor-Bon's tax and business records and concluded that Cor-Bon had grossly understated its sales to its distributors, resulting in hundreds of thousands of dollars of reduced tax liability.

On June 26, 1997, a federal grand jury in Detroit indicted defendants Pi and Cor-Bon, charging them with eighteen counts of tax evasion. In the original indictment, the statutory section defendants were alleged to have violated was 26 U.S.C. § 7202. On July 18, 1997, defendants filed a motion to dismiss the indictment, arguing that section 7202, which charges failure to collect, account for and pay excise taxes, did not apply to them because they had no obligation to collect taxes from a third party. Defendants also moved for the dismissal of counts one through twelve of the indictment as time-barred. On August 26, 1997, the United States responded to the motion and agreed that section 7202 did not

describe the illegal conduct defendants had engaged in. The United States agreed that the first indictment should be dismissed and informed defendants of its intent to seek a superseding indictment.

On the next day, August 27, 1997, the grand jury returned a first superseding indictment, charging defendants with violating 26 U.S.C. § 7201, evading the payment of taxes, in sixteen counts, involving sixteen quarters from the second quarter of 1991 through the first quarter of 1995. On August 29, 1997, the district court granted the motion to dismiss the original indictment based on the government's response.

On September 30, 1997, defendants moved to dismiss the first superseding indictment on the grounds that the dismissal of the original indictment constituted *res judicata* which barred the filing of the superseding indictment. They also argued that count one was barred by the statute of limitations. The government filed its opposition to this motion to which defendants replied. On January 7, 1998, the district court denied defendants' motion to dismiss the superseding indictment, rejecting their argument that the indictment was barred by the doctrine of *res judicata*, because the court found the original indictment had been dismissed merely for citing the wrong statute, and the doctrine of *res judicata* did not apply. Defendants filed a notice of appeal from the order of the district court denying their motion to dismiss the superseding indictment as being barred by *res judicata* and the statute of limitations. On February 6, 1998, the defendants were directed to show cause why their appeal should not be dismissed for lack of appellate jurisdiction because the denial of a motion to dismiss an indictment is not a final order and generally is not appealable. *See United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 264 (1982) (per curiam). The defendants responded to the show cause order, arguing that the denial of their motion to dismiss the indictment on *res judicata* grounds is an appealable collateral order according to the Supreme Court opinion in *Abney v. United States*, 431 U.S. 651 (1977).

Appendix A

On March 16, 1998, a motions panel of this court issued an order allowing the appeal to proceed at the time, because the court was uncertain whether *Abney* applied in the present case, but directed the parties to address the issue of appellate jurisdiction in their briefs and referred the case to the panel assigned to hear it on the merits.

II.

We therefore must first decide whether this court has appellate jurisdiction to hear this appeal. It is axiomatic that this court's jurisdiction is defined by statute. *Id.* at 656. The statute applicable here is 28 U.S.C. § 1291, which grants this court "jurisdiction of appeals from all final decisions of the district courts of the United States. . . ." A pretrial order denying a defendant's motion to dismiss an indictment is not normally an appealable "final decision" under this section. *See United States v. MacDonald*, 435 U.S. 850, 853-54 (1978); *Hoffa v. Gray*, 323 F.2d 178, 179 (6th Cir.), *cert. denied*, 375 U.S. 907 (1963).

The Supreme Court has held, however, that § 1291 does not limit appellate jurisdiction to review of "those final judgments which terminate an action" and has allowed interlocutory appeals in certain instances under the collateral order doctrine. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545 (1949). In *Cohen*, the Court stated that in order to come within the "small class" of decisions excepted from the final-judgment rule, the order from which a party appeals must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment. *Id. See also Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978).

A defendant's right under the Fifth Amendment not to be twice put in jeopardy for the same offense would be lost irreparably if the right could be raised only following

conviction at a second trial.[1] Therefore in *Abney*, 431 U.S. at 658-59, the Supreme Court held that denial of a pretrial motion to dismiss an indictment on double jeopardy grounds is immediately reviewable in the court of appeals as a "collateral order" under *Cohen*. In *Abney*, the Supreme Court permitted a criminal defendant to appeal the denial of his motion to dismiss the indictment on the grounds that it violated his right against double jeopardy after there had already been a trial and final judgment under a prior indictment. The Court reasoned that this right would be lost if the defendant were forced to stand trial a second time. *Id.* at 661.

In a footnote in *Abney*, the Supreme Court addressed the issue of the possibility of a defendant's raising frivolous double jeopardy claims in order to circumvent the final judgment rule of 28 U.S.C. § 1291, stating:

> Admittedly, our holding may encourage some defendants to engage in dilatory [interlocutory] appeals . . . . However, we believe that such problems of delay can be obviated by rules or policies giving such appeals expedited treatment. It is well within the supervisory powers of the courts of appeals to establish summary procedures and calendars to weed out frivolous claims of former jeopardy.

431 U.S. at 662 n.8. *See also Richardson v. United States*, 468 U.S. 317, 322 (1984). Thus, the lower courts may develop expedited procedures to weed out frivolous double jeopardy claims, and several circuits have done so. *See United States v. Ivory*, 29 F.3d 1307, 1310 (8th Cir. 1994); *United States v. LaMere*, 951 F.2d 1106, 1108 (9th Cir. 1991); *United States v. Dunbar*, 611 F.2d 985, 987-89 (5th Cir.), *cert. denied*, 477 U.S. 926 (1980); *United States v.*

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[1] The text of the Double Jeopardy Clause of the Fifth Amendment reads: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

Inmon, 568 F.2d 326, 332 (3rd Cir. 1977), *cert. denied*, 444 U.S. 859 (1979).

In *United States v. Lanci*, 669 F.2d 391, 394 (6th Cir.), *cert. denied*, 457 U.S. 1134 (1982), defendants had taken an interlocutory appeal to this court from the district court's denial of their motions to dismiss the indictment on double jeopardy grounds. In an unpublished order, this court had found that the double jeopardy claim had no merit. During the pendency of the interlocutory appeal, the district court proceeded to trial. In *Lanci*, this court determined that the district court had jurisdiction to proceed, having determined that the interlocutory appeal lacked any "colorable foundation." *Id.* In the present case, the district court did not consider the issue of jurisdiction, and the motions panel declined to dismiss the appeal summarily. Given the procedural posture of this case, we believe we must exercise jurisdiction to the extent necessary to determine whether or not defendants' double jeopardy claim is colorable.

In *United States v. MacDonald*, 435 U.S. at 862, the Supreme Court indicated that an appealable double jeopardy claim under the collateral order doctrine requires at least a colorable showing that the defendant once before has been in jeopardy of federal conviction on the same or a related offense. In the present case, defendants cannot bring a viable claim of former jeopardy, because, unlike *Abney*, there has been no prior trial. Defendants have not been put to trial on the charges in either the original indictment, which was dismissed because it contained the wrong statute, or under the first superseding indictment, and there has never been a final judgment. Therefore, the concerns of the double jeopardy clause simply do not arise in the present case. The Fifth Amendment's guarantee against double jeopardy assures an individual that he will not be forced to endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense. *Green v. United States*, 355 U.S. 184, 187 (1957). The doctrine of *res judicata* bars subsequent litigation between parties on matters that have previously been fully and finally adjudicated because of the

double jeopardy clause guarantee against being twice put to trial for the same offense. *See United States v. Jenkens*, 902 F.2d 459, 462 (6th Cir. 1990); *United States v. Schaffner*, 771 F.2d 149, 152 (6th Cir. 1985). In the present case, defendants have not gone through a criminal trial under the first indictment, which was dismissed merely for citing the wrong statute. Dismissal of an indictment prior to trial simply does not raise any double jeopardy issues and does not bar subsequent prosecution for criminal acts described in that indictment under the doctrine of *res judicata*. *United States v. Senak*, 477 F.2d 304, 306 (7th Cir.) ("[a] federal grand jury may return a second indictment for the same offense when the first indictment has been dismissed or otherwise found defective"), *cert. denied*, 414 U.S. 856 (1973); *United States v. Root*, 366 F.2d 377, 383 (9th Cir. 1966) (the contention that the dismissal of one count of the indictment is *res judicata* is untenable and does not preclude the filing of a superseding indictment), *cert. denied*, 386 U.S. 912 (1967); *Robinson v. United States*, 284 F.2d 775, 776 (5th Cir. 1960) (dismissal of an indictment does not give rise to the defense of *res judicata* in another case involving the same offense). In addition, Fed. R. Crim. P. 12(h) provides that an indictment dismissed because of a defect may be superseded by a new indictment.

The cases on which defendants rely are distinguishable, because most are civil cases that involve dismissal of a subsequent action after a final judgment on the merits in the same case. *See Ruple v. City of Vermillion*, 714 F.2d 860, 862 (8th Cir. 1983) (state court dismissal of action on summary judgment grounds is final and just as binding as a judgment entered after trial), *cert. denied*, 465 U.S. 1029 (1984); *Weston Funding Corp. v. Lafayette Towers, Inc.*, 550 F.2d 710, 715 (2nd Cir. 1977) (failure to state a proper cause of action is a judgment on the merits). Defendants' reliance on *United States v. Oppenheimer*, 242 U.S. 85 (1916) is also misplaced. Defendants argue that in *Oppenheimer*, which involved bankruptcy fraud, dismissal of an earlier indictment was a final judgment on the merits which raised a *res judicata* bar against a second indictment. Defendants read *Oppenheimer* too broadly to include any superseding

indictment. In *Oppenheimer*, the district court dismissed the indictment as barred by a one-year statute of limitations for bankruptcy offenses, and this decision was not appealed. Later, the Supreme Court held in another case that the one-year statute of limitations did not bar prosecution of the offense for which Oppenheimer had been indicted. The government then re-indicted Oppenheimer for the same offense. The Supreme Court was concerned with a specific abuse of the indictment process--re-indictment after a first indictment had failed on statute of limitations grounds. *Id.* at 87. The Court stated:

> It cannot be that a judgment of acquittal on the ground of the statute of limitations is less a protection against a second trial than a judgment upon the ground of innocence.

Id. The Court held that "a plea of the statute of limitations is a plea to the merits," which is a bar to a second indictment in the same words. *Id.* As the Court stated, "when a man once has been acquitted on the merits, . . . the Government [cannot] prosecute him a second time." *Id.* at 88. In contrast, in regard to the present case, dismissal of an indictment for failure to cite the right statute is not a decision or acquittal on the merits, and there is no bar to a superseding indictment. For these reasons, we find that defendants' *res judicata* and double jeopardy claims have no merit.

In *Richardson v. United States*, 468 U.S. at 318, the Supreme Court reviewed the defendant-petitioner's double jeopardy claim. The jury trying petitioner acquitted him of several counts, but was unable to agree on others. The district court declared a mistrial as to these counts and set them for retrial. The petitioner moved to bar his retrial, claiming that a second trial would violate the Double Jeopardy Clause of the Fifth Amendment because evidence sufficient to convict on the remaining counts had not been presented by the government at the first trial. After rejecting the claim on the merits, the Court then stated:

> It follows logically from our holding today that claims of double jeopardy such as petitioner's are no longer "colorable" double jeopardy claims which may be appealed before final judgment. A colorable claim, of course, presupposes that there is some possible validity to a claim. Since no set of facts will support the assertion of a claim of double jeopardy like petitioner's in the future, there is no possibility that a defendant's double jeopardy rights will be violated by a new trial, and there is no need to interpose the delay of appellate review before a second trial can begin.

Id. at 326 n.6.

We believe the same reasoning applies in the present case. Because there is no set of facts that will support assertion of a claim of double jeopardy like defendant's, it follows logically from our holding that in the future, claims of double jeopardy such as defendants' are not "colorable" double jeopardy claims which may be appealed before final judgment. *See MacDonald*, 435 U.S. at 862. We find that there is no possibility that a defendant's double jeopardy rights will be violated when an indictment, which cites the wrong statute, is dismissed prior to trial, and a superseding indictment is filed. Because there is no possible validity of such a claim, in the future such a claim is not appealable under the collateral order doctrine.

To conclude, we find the district court did not err in denying the motion to dismiss the indictment. In the present case, the dismissal of the original indictment did not in any way address the merits of the case, and no factual issues were decided. There was no prior trial or adjudication under the original indictment, as was the case in *Abney*. Therefore, there was no former jeopardy and there is no *res judicata* bar to the government's dismissal of the original indictment and then filing a superseding indictment. The district court is affirmed on this issue.

III.

Defendants also appeal the district court's denial of their motion to dismiss Count One of the indictment on statute of limitations grounds. We find we do not have jurisdiction to hear this claim. The Supreme Court stated the following in *Abney*:

> Our conclusion that a defendant may seek immediate appellate review of a district court's rejection of his double jeopardy claim is based on the special considerations permeating claims of that nature which justify a departure from the normal rule of finality. Quite obviously, such considerations *do not extend beyond the claim of former jeopardy* and encompass other claims presented to, and rejected by, the district court in passing on the accused's motion to dismiss. Rather, such claims are appealable if, and only if, they too fall within *Cohen*'s collateral-order exception to the final-judgment rule. Any other rule would encourage criminal defendants to seek review of, or assert, frivolous double jeopardy claims in order to bring more serious, but otherwise nonappealable questions to the attention of the courts of appeals prior to conviction and sentence.

Id. at 663 (emphasis added).

Under this reasoning, although the Court in *Abney* allowed prejudgment review of the double jeopardy claim, it declined to extend review to a sufficiency of the indictment claim. *Id.* In refusing to extend review, the Court noted that such action would encourage parties to seek review of a frivolous appealable claim as a vehicle to secure review of other nonappealable determinations. *Id.* In the present case, we believe this is what has occurred in regard to the statute of limitations claim. It is well settled law that an order denying a motion to dismiss an indictment on statute of limitations grounds is not immediately appealable under the collateral order doctrine. *United States v. Davis*, 873 F.2d 900, 908-09 (6th Cir.) (court concludes it lacks jurisdiction to entertain a pretrial appeal from the district court's ruling on the statute of

limitations question even though it had jurisdiction to hear double jeopardy issues under the collateral order exception to the final judgment rule), *cert. denied*, 493 U.S. 923 (1989); *See also United States v. Weiss*, 7 F.3d 1088, 1089-90 (2nd Cir. 1993).

Moreover, the motions panel in its order of February 6, 1998, has already decided this issue, stating that an order denying a motion to dismiss on statute of limitations grounds is not immediately appealable. For these reasons, we find we do not have appellate jurisdiction to hear the merits of defendants' statute of limitations claim on interlocutory appeal. Defendants, however, retain the right to raise the validity of their statute of limitations claim on appeal from a final judgment by the district court. *United States v. Ivory*, 29 F.3d at 1312.

IV.

To conclude, we find that the district court did not err in refusing to dismiss the indictment because the indictment did not violate the double jeopardy clause and was not barred by the doctrine of *res judicata*.

We decline to hear defendants' statute of limitations claim in this interlocutory appeal for lack of appellate jurisdiction.

The district court is **AFFIRMED**, and the case is **REMANDED** to the district court for proceedings consistent with this opinion.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DIVISION OF MICHIGAN, SOUTHERN DIVISION DATED AND FILED JANUARY 7, 1998

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Criminal No. 97-CR-80681
Honorable Robert E. DeMascio

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PETER PI and COR-BON CUSTOM BULLET CO.,

Defendants.

ORDER

This matter is before the court on defendants' motion to dismiss the government's first superseding indictment. The government has charged plaintiff with a violation of 26 U.S.C. § 7201. Defendants contend that this charge is barred by *res judicata* and the statute of limitations.

Defendants have been manufacturing ammunition for firearms since 1990. In 1995, an employee of Cor-Bon notified the Bureau of Alcohol, Tobacco and Firearms (ATF) that Cor-Bon had been underreporting its ammunition

sales to reduce its tax liability.[1] A subsequent investigation by the ATF concluded that Cor-Bon had grossly under stated its sales.

On June 26, 1997, defendants were indicted by a federal grand jury for 18 counts of tax evasion. On July 16, 1997, defendants filed a motion to dismiss the indictment. The government concurred with this motion which the court granted on August 27, 1997. On the same day, a grand jury returned a First Superseding Indictment charging defendants with 16 counts of evading the payment of taxes in violation of 26 U.S.C. § 7201. Defendants contend that *res judicata* bars the government's superseding indictment.

For *res judicata* to apply, three things must be present:

> (1) There must have been a final judgment on the merits;
>
> (2) The prior action must have involved the same parties or privies; and
>
> (3) The prior action must have involved the same claim.

Cromwell v. Sac County, 94 U.S. 351, 352 (1876). There is no question that requirement (2) is met in the present litigation. However, requirement (3) is not met. The superseding indictment is not the same claim as the original indictment, the government is not charging defendants under the same offense.

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1. Defendants assert that the informant was a disgrunled ex-employee who did defendants' tax returns during the times in question.

Furthermore, defendants contend that our dismissal of the first indictment was a final judgment on the merits according to Fed. R. Civ. P. 12(b)(6). This contention is faulty. The original indictment was not dismissed under Rule 12(b)(6). This was never a civil matter, nor were the merits of the case ever reached. When we dismissed the first indictment we did not address the general issue of guilt or innocence, nor did we conclude that no charge was possible for the offense alleged in the dismissed indictment.

A defendant has the burden of showing that the claim he wants precluded was already litigated in the prior proceeding. *United States v. Blackwell*, 900 F.2d 742, 745 (4th Cir. 1990). The prior claim that the government had against defendants was not litigated. Therefore, defendants' motion to dismiss the superseding indictment based upon *res judicata* is denied.

Next, defendants allege that the statute of limitations has run on the superseding indictment. The original indictment against defendants was filed on June 26, 1997, for violating 26 U.S.C. § 7202 for the second quarter of 1991, ending July 31, 1991. The superseding indictment was filed August 27, 1997. The original indictment was clearly within the six year statute of limitations set forth in 26 U.S.C. § 6531. According to the Sixth Circuit, a superseding indictment relates back in time to when the original indictment was filed. *United States v. Lash*, 937 F.2d 1077, 1081 (6th Cir. 1991). Therefore, the superseding indictment was filed within the prescribed statute of limitations.

Appendix B

NOW, THEREFORE, IT IS ORDERED that defendants' Motion to Dismiss First Superseding Indictment is **DENIED.**

s/ Robert E. DeMascio
Robert E. DeMascio
United States District Judge

Date: JAN 7 1998